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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 960

CANADIAN NATIONAL RAILWAY COMPANY,
Petitioner

vs.

GEORGE TAYLOR,
~~*Petitioner*~~

~~PETITIONER'S~~ Respondent's REPLY TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term 1961

No. 960

Canadian National Railway Company,

Petitioner

vs.

George Taylor,

Petitioner

PETITIONEE'S REPLY TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The petitionee says that there was an opinion entered by the District Court for the Second District, but it has not been reported. See Appendix A, Page 7, of Petioner's Petition for a Writ of Certiorari for the decision as handed down by the District Court of Appeals.

Jurisdiction

Plaintiff petitionee denies that this Court has jurisdiction of the subject matter. Petitioner has had two fair trials, one by jury and one on appeal, all trials may seem unfair and partial to the losing party.

Question Presented

The petitioner continues to incorrectly quote the record. The Court did not find that the verdict was excessive because the jury became "infuriated" by the conduct of certain petitioner's employees. The Court did not so find! This is the Court's finding as set forth in "Order Denying Defendant's Motion for New Trial Upon the Condition that the Plaintiff Remit a Certain Sum from the Verdict:—

> "The Court feels that there is no question but that the defendant was liable in this action, and that the plaintiff suffered substantial injury, but, *because of the age* of the plaintiff, this verdict was somewhat excessive and that the plaintiff should remit part of the verdict."

Our courts have repeatedly held that excessive verdicts can be corrected by the filing of a remittitur instead of a new trial, where as here the record does not disclose any irregularity or taint of prejudice or passion.

There is no evidence in this case indicating that the verdict is in any wise tainted. As the Court of Appeals so aptly stated, "The court, however, based its determination that the verdict was excessive on the age of the plaintiff and not on any appeals to or prejudice on the part of the jury. Indeed, had a finding of passion and prejudice been made, it would have been clearly erroneous because without support in the record here. There is here no claim that counsel in argument made any improper appeal. The surmise of the court as to the jury's feelings seems pure speculation reflecting the court's own reaction to testimony, with no basis for a conclusion that the jury felt as the judge here did. The jury may as well have dispassionately made an excessive estimate of the work expectancy of this individual plaintiff had the accident not occurred."

A judgment should not be reversed for any reason not apparent in the record.

Statute and Constitutional Provisions Involved

The question of the Fifth Amendment and the Seventh Amendment is not involved in the matters now under consideration, and more in particular to the "due process" clause of either of the Amendments. Petitioner made a motion for a new trial upon several grounds, all of which it has abandoned, except the exception that it was inspired by passion, sympathy or prejudice on the part of the jury. The motion for a new trial was denied upon condition that the plaintiff remit $20,000 from the verdict of $70,000, which remittitur plaintiff filed, and judgment was entered for $50,000 for plaintiff. The Court, in ordering a remittitur, made several observations in regard to certain matters, that occurred during the trial, and the Court did use among other words that the jury apparently had become "infuriated" and helped produce the size of the verdict. The Court did not find that there was any passion, prejudice or sympathy involved in the verdict. The U. S. Court of Appeals for the Second Circuit stated, "Indeed, had a finding of passion and prejudice been made, it would have been clearly erroneous because without support in the record here."

The petitioner is in error, when, by inference, he states that the Court declined to apply the rule of passion and prejudice in this particular case, and leaves the inference that the verdict resulted from the jury's passion and prejudice. The Court most definitely set out the grounds for the filing of the remittitur, and did not find that passion and prejudice were involved in the case, and had it been found "it would have been clearly erroneous because without support in the record here." At no time has either Court, Dis-

trict or Court of Appeals, intimated that the case is tainted by passion or prejudice.

In the case before us there never was an issue of passion or prejudice as far as the Trial Court was concerned, and the Court of Appeals searched the whole record as requested by the Petitioner, and it states that the record does not support Petitioner's claim and it stated if the the Trial Court had so found it would have reversed the Trial Court, on the record before it.

Reason For Granting the Writ

The petitioner raises the "question of the right of every litigant to a fair trial by a fair and impartial jury, guaranteed by the due process clause of the Fifth Amendment and by the Seventh Amendment", then cites the case of Baker v. Hudspeth, 129 Fed. (2) 779 (Cert. denied 317 U. S. 681, rehearing denied 318 U. S. 800) at page 781. This case definitely held that if a person "is tried in a court of competent jurisdiction, represented by counsel, twelve jurors, under the superintendance of a judge*** *it will be presumed in the absence of plain and cogent evidence to the contrary, on petition of habeas corpus, that defendant was granted a fair and impartial trial as guaranteed by the court and that all rules of due process were observed.*" "The integrity of the jury cannot be assailed by mere suspicion and surmise." Page 782: "It is *presumed* that the jury will be true to their oath and conscience, observing the instructions and admonitions of the court."

The claims made by the petitioner must be supported by the record. The record is silent as to any misconduct. The courts have never found any passion or prejudice. The verdict was reduced solely on the statement made by the court

in its order to the plaintiff to remit a certain sum of the verdict. The Court stated, "The court feels that there is no question but what the defendant was liable in this action, and that the plaintiff suffered substantial injury, *but, because of the age of the plaintiff, this verdict was somewhat excessive and that the plaintiff should remit part of the verdict.*"

Petitioner cites the case of U. S. v. Chapman, 158 Fed. (2) 417, 419. The facts and conditions are so far apart that it is impossible to reconcile any similarity between the two cases. The conduct of the jury in this case is a matter of record. The U. S. v. Chapman, supra, record glaringly discloses a carelessness in the conduct of the juror, that the court had no other recourse except to do what it did do in the case, reverse it.

In the case before us the record is silent as to any misconduct on the part of anyone! While the three witnesses became reluctant witnesses and failed to remember discussion had with petitionee's counsel, the record does not disclose, nor was there any such misconduct, as was so apparent, in the Chapman case. Reversal was finally made in the above case, and it was based on the juror listening to a discussion of another case affecting land appraisals, in which discussion a retired judge of this court talked about his conduct on a land case, and the court ruled that the juror's mind was no longer impartial. P. 422, last paragraph.

The petitioner in its Writ has repeatedly made many statements and called to the attention of this Court the law of a case where passion and prejudice was found by the Court on the record, and the record disclosed such condition to exist, but nowhere has it called to the attention of this Court any comparable fact or situation which existed in the cases cited and the case before this Court. It has as-

sumed facts and presumed non-existing situations that are not to be found in the case before this Court. As of this instant the Petitioner has failed to produce any one fact based on the record that passion or prejudice entered into the verdict of the jury.

The petitioner, in his "Second" point under "Reason for Granting the Writ", calls to this Court's attention that the Court of Appeals' decision in this case is contrary to the decision of this Court in Minneapolis, etc., Ry. v. Moquin, 283 U. S. 520, and cases approving it. In all of these cases it was found that passion and prejudice existed and the facts in those cases are in no way consistent with the facts in the case before us, that to compare the cases would entail a great deal of pure speculation or imagination. In order to answer the point, it is necessary to reiterate that passion or prejudice was not found by the Trial Court and the Court of Appeals stated in its decision that "Indeed, had a finding of passion and prejudice been made, it would have been clearly erroneous because without support in the record here."

In the Minneapolis, etc., Ry. case vs. Moquin, supra, misconduct was found by Minnesota Supreme Court; in New York Central vs. Edward Johnson, 279 U. S. 310, misconduct of counsel; and in Berger vs. U. S., 295 U. S. 78, misconduct of counsel; and Viereck vs. U. S. 318 U. S. 236, improper remark of counsel. These cases and the others quoted have absolutely nothing in common by which this Court can compare the merits of the same with the case before us; and petitionee says that the second point stressed by the petitioner is far from the facts in issue.

In presenting the third point to the above heading, the petitioner says that the decision of the Court of Appeals is in direct conflict with the decision of the Court of Appeals

from the Fifth Circuit and it cites the case of Brabham vs. State of Mississippi, 96 Fed. (2) 210. In that case the Trial Judge concluded that *"The verdict was oppressive and amounted to an injustice."* Page 213, paragraphs 9, 10. The *trial judge stated* at Page 212, "*** The Judge should never displace the judgment of a jury upon a question of damages unless he is of the opinion that it is so *grossly excessive as to really amount to an injustice*, and particularly is this rule applicable when punitive damages are allowed."

In the case before us, as it has been stated, the Court found that "because of the age of the plaintiff this verdict was somewhat excessive." The defendant-petitioner has admitted in argument before the Trial Court and in his appeal to the District Court of Appeals that the plaintiff-petitionee stands to lose wages totalling $33,150.00, medical and hospital bills of approximately $2,000.00, leaving a balance of $14,850.00 for pain and suffering for a life expectancy of thirteen years. The permanent injuries, and the past and future pain and suffering, medicals, wages, and the nervous disorder all caused by this acident, is the basis to be used as to what is excessive. Petitionee is a 62 year old laborer, is totally disabled from his regular occupation by a basal skull fracture, now suffering severe headaches, dizziness, nervousness and, above all, defeat. It cannot be said that the verdict of $50,000.00 reflects any passion or prejudice.

In the case before us, as it has been stated, the Court found that "because of the age of the plaintiff this verdict was somewhat excessive." The petitioner would lead this Court to believe that the jury in the Fifth Circuit case became "enraged" by the action of one of the parties to the litigation. I have diligently searched the record, more in particular the opinion of the Judge upon which the remittitur was asked, and I do not find that "the Trial Court found

that the jury became enraged." In the Fifth Circuit case, the Trial Court and the Court of Appeals both found that the damages *"were oppressive, and amounted to an injustice."* In the case before us, the Trial Court and the Appellate Court both found that the record is free from passion and prejudice, and that it was not a tainted verdict.

Conclusion

The Petitionee respectfully prays of this Honorable Court that the defendant-petitioner's Writ of Certiorari be denied, and that the judgment of the U. S. Court of Appeals for the Second Circuit be affirmed.

May 31, 1962.

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